Supreme Court, U.S.
FILED
OCT 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1459 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

GUILLERMO HERNANDEZ-CARTAYA AND FRANCISCO J. FERNANDEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

9 pp

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1459

GUILLERMO HERNANDEZ-CARTAYA AND
FRANCISCO J. FERNANDEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In their reply brief, petitioners have asserted that we misstated the record in our brief in opposition to the petition for a writ of certiorari.

1. Most of petitioners' assertions relate to their point concerning the newspaper article that appeared after the jury retired to deliberate.

a. Petitioners first take issue (Reply Br. 2-3) with our statement (Br. in Opp. 14 n.11) that "one of petitioner Hernandez-Cartaya's character witnesses brought out petitioner's links to Cuba (12 R. 3291-3294) * * *." Petitioners contend (Reply Br. 3) that the cited testimony "says simply that Cartaya was a friend of a State Department officer in Havana in 1953." But the testimony goes beyond that. The witness testified that he had been assigned to the United

States embassy in Havana as a political officer in January 1953 and was there until November 1953 (12 R. 3292). He further testified (*ibid.*) that he became friends with petitioner and his family early in his (the witness') tour and that he had had occasion to seek advice and information from petitioner about the trends of Cuban political figures and political parties (*id.* at 3292-3293). Moreover, petitioners have acknowledged that "the jury did hear about Cartaya's experience at the Bay of Pigs" (Reply Br. 2). As petitioners point out (Reply Br. 3), the above-cited testimony does not suggest that Hernandez-Cartaya was linked to the CIA or to Fidel Castro. We did not say that it did. As for a CIA link, however, it should be noted that defense counsel cross-examined prosecution witness Carlos Fernandez about whether Eduardo Martinez, an employee of WFC (8 R. 1560), had any association or relationship with the CIA (8 R. 1575-1576). Although the witness denied having any personal knowledge of this matter,[1] the possibility of a CIA link was mentioned before the jury at trial.

---

[1]Q. Going back to Eduardo Martinez, do you have any personal knowledge whetheror [*sic*] not he had any association or relationship with the CIA during the time he worked for WFC or at any time?

A. I think Eduardo Martinez, from what I heard, and this is just from what I head [*sic*] —

MR. STROTHER: Objection, Your Honor, as to hearsay.

THE COURT: Sustained.

BY MR. MEADOWS:

Q. Do you know of your own personal knowledge, Mr. FErnandez? [*sic*]

A. No. I don't. I don't know. I mean, I don't see a badge saying CIA.

Q. Pardon?

A. I don't see a badge saying CIA. I don't know.

MR. MEADOWS: Thank you.

8 R. 1576.

b. Petitioners next assert (Reply Br. 3) that, contrary to our statement (Br. in Opp. 14 n.11), the trial testimony (11 R. 2763-2765, 2773-2774) does not suggest that WFC was a "large-scale swindle."[2] The first citation is to the testimony of Fernando Capablanca. Although he did not admit that WFC had paid a bribe disguised as a loan to an influential Costa Rican (a former president of that nation), the jury could have readily inferred from his testimony that such a payment had been made. The second citation is to Capablanca's testimony on cross-examination that he had managed the WFC bank in Costa Rica for about 18 months, that his management of the bank was successful "[t]o some extent," and that the bank had closed its doors after losing $400,000 dollars (11 R. 2773). He denied that the loss had anything to do with the management of the bank, and the following transpired (*id.* at 2773-2774):

> Q. I see. It wasn't your fault that the bank you were managing closed its doors and lost $400,000?
>
> A. The bank was owned, sir, by WFC Corporation and by another bank in Miami.
>
> Q. As a matter of fact, when you came back to Costa Rica, you were then a fallen star in the company, weren't you?
>
> A. I don't recall that at all, sir.
>
> Q. As a result of the debacle of the disaster of the Coasta [*sic*] Rican bank, you were sort of shunted aside, weren't you?
>
> A. Not really, sir.

---

[2] In pressing this argument, petitioners themselves err by characterizing (Reply Br. 3 n.1) part of that testimony as a "highly-unsuccessful attempt by the prosecutor to get a witness to admit that he paid a bribe to an important official in Costa Rica * * *." The testimony was not elicited by the prosecutor, but by defense counsel during cross-examination of Fernando Capablanca (11 R. 2764-2765).

Thus, the cross-examination of Capablanca suggested that WFC had engaged in dishonest practices and that the failure of the Costa Rican bank may have been due to more than simple mismanagement.[3]

c. Petitioners next challenge the citations supporting our statement that the defense elicited information regarding certain bank frauds.

The newspaper article referred specifically (and briefly) to only two bank frauds—one involving the WFC bank in Costa Rica and the other involving a WFC bank in the Arab Emirate of Ajman (Pet. App. 22a-23a). With respect to the former (*id.* at A23), the article simply described the portion of the cross-examination of Capablanca discussed above concerning whether WFC had paid a bribe disguised as a loan to a political leader in Costa Rica. References to the WFC bank in Ajman (9 R. 2167-2168; 10 R. 2620; and 11 R. 2917), which we cited, provided the following. Eli Tourgeman, a former employee of WFC (9 R. 2117-2118), testified on defense cross-examination (9 R. 2167-2168) that, in June 1977, petitioner Hernandez-Cartaya was in Ajman trying to work out some financial problems that had arisen with the government of that country in connection with the bank there. David Masnata, a former chief of the legal department at WFC Corporation (10 R. 2537), testified that the Ajman authorities had taken Hernandez-Cartaya's passport because "[t]hey were unhappy with him" (10 R. 2620). Fernando Capablanca, whom Hernandez-Cartaya left in charge of the administrative activities of WFC while he was in Ajman (11 R. 2918), testified on cross-examination that Hernandez-Cartaya had gone to

---

[3]Furthermore, this case was about a "large-scale swindle" — the attempt by WFC and its officials fraudulently to deprive the United States of tax revenues. The newspaper article did not expressly identify any particular activities as the swindle.

Ajman to try to resolve difficulties the bank was having with the government of that country (11 R. 2917). Capablanca further testified that while Hernandez-Cartaya was in Ajman, he (Capablanca) was asked to be president of the company (11 R. 2919) and that he "was of the opinion that he [Hernandez-Cartaya] might have some difficulties getting out of Ajman" (11 R. 2921). Thus, there was a suggestion before the jury that the bank had not merely suffered financial reverses.

Other portions of the record that we cited state the following. An FBI special agent testified that, in connection with his assisting a grand jury investigation of WFC and petitioner Hernandez-Cartaya, he went to Panama and examined records of the WFC bank there concerning WFC and petitioner Hernandez-Cartaya (9 R. 2049-2056). Earlier, Angel Marichal, who had been director of internal audits and, later, comptroller of WFC (8 R. 1662), was under cross-examination. While with WFC, his duties included reviewing the financial statements and accounting of banks owned by WFC, including a bank in Panama (8 R. 1662; 9 R. 1881-1882). Marichal was asked by a defense counsel (9 R. 1908), "Did you, in January, 1978, tell him [Gustavo Manci Mondai] that you were asked by the FBI whether while you were working for the corporations any of the corporations had violated any of the regulations, and did you tell him that you responded in the negative, that to your knowledge, no, none of the companies violated any of the Federal regulations?" Marichal replied that he could not remember the name, interview, or date, but affirmatively responded to the question whether "it may have happened and it may have not?" (*ibid.*). Defense counsel had previously asked Marichal, "Have you told the FBI that WFC and its affiliates and subsidiaries had not violated any Federal regulations?" (9 R. 1907). Marichal answered that he could not recall saying that and that "I cannot deny it or affirm it" (*ibid.*). Hence, although the agent did not identify

the types of possible offenses under investigation, his testimony, together with the cross-examination questions to Marichal about FBI inquiries on whether WFC had violated federal regulations, suggested that the FBI and the grand jury were investigating possible violations of banking regulations by WFC, which, of course, could have amounted to bank fraud.

The possibility of bank fraud was also suggested by the testimony of defendant Henry Heitman during cross-examination (12 R. 3244-3245) that we cited. Heitman testified on direct examination that from the end of July 1976 until February 1977, he was employed by a bank owned by petitioner Hernandez-Cartaya (12 R. 3210-3211, 3220). At the pages we cited, Heitman testified that in February 1977, when he returned to WFC, the bank was under examination by bank examiners.

d. Finally, petitioners assert (Reply Br. 4) that we provided "a long string of citations for the contention that the jury knew all about the 'various government investigations of WFC and its officers . . . .' " We made no such contention; we simply stated that "defense cross-examination elicited information regarding * * * various government investigations of WFC and its officers" (Br. in Opp. 14-15 n.11). Furthermore, while petitioners are correct that the portions of the transcript we cited do not refer to investigations by the Drug Enforcement Administration, the Public Safety Department, and the House Narcotics Subcommittee (and we did not say that they did), petitioners are incorrect in asserting that the cited portions "do not even *hint* that the investigation of these two agencies involved anything other than the tax charges which were before the jury" (Reply Br. 4 (emphasis in original)). As discussed above, some of the references to FBI inquiries suggested that bank frauds, as well as tax offenses, were under investigation by the FBI and by bank examiners (pages 5-6, *supra*).

2. Petitioners also contend (Reply Br. 6-7 n.4) that we misstated their position in the court of appeals regarding the jury instruction on the government's burden of proof. We stated (Br. in Opp. 9-10 n.7), "In the court of appeals, petitioners argued that the district court had correctly instructed the jury and the court reporter had erred in transcribing the court's jury charge." In challenging this statement and setting out what they said in their brief, petitioners omit the following sentence: "The appellants contend that the instruction was *read* correctly, but *typed* incorrectly, though we cannot prove it" (Hernandez-Cartaya C.A. Br. 40 (emphasis in original)). This sentence immediately follows the quotation from page 40 of petitioner Hernandez-Cartaya's court of appeals' brief cited by petitioners.[4]

Petitioners also assert that we mischaracterized our argument to the court of appeals. On reexamination, it appears that we misconstrued a passage in our brief (at 99); it now appears that our court of appeals' brief simply accepted the defendants' contention that the district court correctly delivered the instruction at issue and that the reporter transcribed it incorrectly.[5] We regret this error and assure the Court that we did not intend to be misleading;

---

[4]Similarly, petitioners have also omitted the following sentence from page 7 of petitioner Hernandez-Cartaya's court of appeals brief: "It is the recollection of the counsel for the three appellants that the court actually gave a correct charge, but of course that recollection cannot be verified." This sentence immediately follows the quotation from page 7 of petitioner Hernandez-Cartaya's court of appeals' brief cited by petitioners in their reply brief (at 6-7 n.4).

[5]The statements in our court of appeals' brief to which petitioners point (Reply Br. 7 n.4) — that the district court orally gave a correct instruction (Gov't C.A. Br. 48) and that it was not disputed that the district court had correctly charged the jury on the burden of proof 20 times (Gov't C.A. Br. 101) — referred to the petitioners' briefs in the court of appeals.

indeed, we lodged a copy of our brief with the Clerk of this Court. Finally, we acknowledge that, as petitioners point out, petitioner Hernandez-Cartaya's reply brief in the court of appeals provided some evidence to support his argument that the erroneous transcript was given to the jury. In any event, our argument was (Br. in Opp. 10 n.7) that petitioners' claim must fail regardless of what actually happened at trial.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

OCTOBER 1985

Thus, the Court of Appeals erred in concluding that the manifest error of this charge was harmless simply because the charge was stated correctly at other times.

III. The Co-Defendant's Closing Argument. The respondent addresses this point at pages 7-8 of its typewritten brief. The curious answer is that this Court should deny the writ because both the trial court and the appellate court held that the closing comments by Heitman's counsel did not constitute an indirect comment upon the petitioners' silence: "Given these concurrent findings by both lower courts, review by this Court of petitioners' fact-bound claim is unwarranted" (typewritten brief at 8). And in a footnote on the same page, the respondent simply quotes several of the appellate court's conclusions about these various comments.

Even if the conclusions of the trial court and the appellate court on this issue had been purely "fact-bound" in nature, this would be a novel approach to the question. Even this Court might review factual conclusions if clearly erroneous. But there are no factual disputes on this issue—since Heitman's closing argument is on the record. The question is whether that argument—as a matter of law—was reversible error because it constituted an indirect comment upon the other defendants' unwillingness to take the stand. That is a question of law, and there can be no better proof of that than the dozens of cases cited on this issue by both sides. In every one of them, the appellate court undertook *de novo* to determine whether the comments at issue reflected the intention or the natural and necessary effect of commenting upon the failure of a defendant to take the stand.

Incredibly, the respondent chooses not to argue that question, and thus we rest with the contentions raised

in our initial petition. As we demonstrated, Heitman attempted to do two things in his closing argument—to point out that he was different from all of the other defendants because he had testified; and to point out that his testimony was uncontradicted, because it concerned private conversations with Cartaya which *only* Cartaya was in a position to deny. Both of those attempts naturally and necessarily called the jury's attention to Cartaya's failure to take the stand. The respondent does not even attempt to deny that obvious conclusion, and thus the error of the Court of Appeals' holding on this point.

CONCLUSION

It is respectfully urged that a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

By: JOEL S. PERWIN

August 5, 1985